

7-3001-2807-2
IRCC

942-61793/T-88-301

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of the Petition
of Glen D. Wilson, d/b/a Granite
City Moving & Storage, Transferor,
and John S. Herold, Transferee,
to Transfer Irregular Route
Common Carrier Permit Authority

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before
Administrative Law Judge Richard C. Luis on July 19, 1989 at the
St. Cloud City Hall, St. Cloud, Minnesota. The record in this
matter closed on November 2, 1989.

John R. Koch, Esq., Reichert, Wenner, Koch & Provinzino, P.A.,
P.O. Box 1556, 501 St. Germain, St. Cloud, Minnesota 56301,
appeared on behalf of John S. Herold ("Transferee"). James H.
Wills, Esq., Kalina, Wills & Woods, P.A., Suite 102 South, 4111
Central Avenue Northeast, Minneapolis, Minnesota 55421, appeared
on behalf of Glen D. Wilson, d/b/a Granite City Moving & Storage
("Transferor"). Grant J. Merritt, Esq., Grant J. Merritt &
Associates, Ltd., 4690 IDS Center, Minneapolis, Minnesota 55402,
appeared on behalf of Protestants Red's Transfer & Storage, Inc.
and Vector Moving Systems, Inc. Robert D. Gisvold, Esq.,
Mackall, Crounse & Moore, 1600 TCF Tower, 121 South Eighth
Street, Minneapolis, Minnesota 55402, appeared on behalf of
Protestants Hyman Freightways, Inc. and Berger Transfer &
Storage.

Notice is hereby given that, pursuant to Minn. Stat. 14.61,
and the Rules of Practice of the Public Utilities Commission, as
applicable to the Transportation Regulation Board, and the Rules
of the Office of Administrative Hearings, exceptions to this
Report, if any, by any party adversely affected must be filed
within 20 days of the mailing date hereof with the Transportation
Regulation Board, Minnesota Administrative Truck Center, 254
Livestock Exchange Building, 100 Stockyards Road, South St. Paul,
Minnesota 55075. Exceptions must be specific and stated and
numbered separately. Proposed Findings of Fact, Conclusions and
Order should be included, and copies thereof shall be served upon
all parties. If desired, a reply to exceptions may be filed and
served within ten days after the service of the exceptions to
which reply is made. Oral argument before a majority of the
Board may be permitted to all parties adversely affected by the
Administrative Law Judge's recommendation who request such
argument. Such request must accompany the filed exceptions or

reply, and an original and five copies of each document must be filed with the Board.

The Minnesota Transportation Regulation Board will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Board may, at its own discretion, accept or reject the Administrative Law Judge's recommendation and that said recommendation has no legal effect unless expressly adopted by the Board as its final order.

STATEMENT OF ISSUE

Whether Glen Wilson, d/b/a Granite City Moving & Storage, should be allowed to transfer his IRCC permit authority to John Herold, in accordance with Minn. Stat. 221.151, subd. 1.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Transferor holds "grandfather" irregular route common carrier (IRCC) authority to transport general commodities statewide. At the beginning of the hearing, the parties stipulated that the transfer of authority proposed in this proceeding was limited to the authorities to transport residential household goods (as defined by Minn. Rule 7800.0100, subps. 6A and 6C) and office furniture (as defined by Minn. Rule 7800.0100, subp. 6B), with the following restrictions: transportation of residential household goods restricted to transportation between points in Stearns, Sherburne, Benton, Morrison, Douglas and Wright Counties, on the one hand, and, on the other hand, all points in Minnesota; transportation of office furniture restricted to transportation between points in Stearns, Sherburne and Benton Counties.

Upon the acceptance of the above restrictive amendments by the Board, Protestants Hyman Freightways and Berger Transfer will withdraw their Protests.

On the understanding that the Petition for Transfer would be amended to reflect the transfer of authority to transport only household goods (which are defined as encompassing all commodities noted in Subpart 6 of Rule 7800.0100), Protestant Indianhead Truckline, Inc. withdrew its Protest on July 17, 1989 and did not appear at the hearing. The only Protestants actively contesting the proposed transfer, as amended, at the hearing were those represented by attorney Merritt (Red's Transfer & Storage and Vector Moving Systems, two St. Cloud-area movers).

2. The Transferee, John Herold, has been involved in the moving business for over 35 years. From 1953 to 1959, he was employed as a dispatcher, office manager and salesperson in St.

Paul for Beltman North American Company, the St. Paul agent for North American Van Lines. Between 1959 and 1964, Herold and two business partners operated an agency for North American Van Lines in Fargo, North Dakota.

In 1964, Mr. Herold went into the moving business for himself in St. Cloud, Minnesota. That same year he registered the trade name "Granite City Moving & Storage" for himself with the Minnesota Secretary of State's Office. He has operated as the St. Cloud agent for North American Van Lines since that time, operating under ICC Permit No. MC107012.

3. Mr. Herold has never had intrastate authority from the Board or its predecessors to move household goods or to operate as a motor carrier. He engaged in such moving, as part of the business of Granite City Moving & Storage, between 1964 and 1970 by operating under the IRCC authority of Gray's Dray & Storage of Detroit Lakes. Between 1970 and 1974, he operated in a similar fashion with a different holder of IRCC authority, Glen D. Wilson.

4. Between 1964 and 1974, Herold was employed as a manager for Gray's and Glen Wilson, in turn, under oral arrangements whereby he operated, managed

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and conducted the business, on the conditions that he account to the authority holders for all income received on a periodic basis, pay the ongoing business expenses, including vehicle and liability insurance, and that he supply and maintain the vehicles used in the business, which he leased to the authority holders. Under these arrangements, Herold received approximately 95% of the gross income from the intrastate moving business and remitted five percent of that gross to the authority holders on a monthly basis. These arrangements continued on an oral contract basis until 1974.

5. The Transferor, Glen D. Wilson, had operated a moving business in Owatonna, under his own intrastate authority (IRCC Permit No. 942, the permit proposed for transfer in this proceeding) and, for interstate moves, as an agent for North American Van Lines. As a result of being agents for North American, Wilson and Herold had been acquainted for a number of years at the time (early in 1970) when Mr. Wilson decided to retire from actively operating a moving business. Mr. Wilson approached Mr. Herold and asked if he wanted to operate his St. Cloud business as a manager under his (Wilson's) authority, rather than under the authority of Gray's Dray, and Herold accepted.

Since Wilson and Herold agreed to go into business together, Wilson has registered his authority with the Board and its predecessors under the name of Glen Wilson, d/b/a Granite City Moving & Storage. Glen Wilson ceased active operation of his

moving business and moved from Owatonna to Remer, Minnesota, where he resides today. Wilson and Herold executed a sale and purchase agreement regarding Wilson's authority, but never formalized their employment relationship or vehicle lease arrangements in writing.

6. On August 15, 1974, Wilson and Herold, as Transferor and Transferee, respectively, applied to the Minnesota Public Service Commission (PSC) for the transfer of Wilson's IRCC authority. The Commission denied the Petition on November 5, 1974, concluding under the applicable statute, Minn. Stat. 221.151, that the Transferor had not actively exercised his authority within the two years immediately preceding the Petition. At Finding III of its 1974 Order, the PSC found that Wilson had not actively engaged in transportation services under his authority since January 1970 and, at Finding IV, that the Transferee (Herold) has been actively engaged as a household mover under color of the Transferor's authority but "in the absence of any employment or lease arrangement with Transferor".

7. On October 30, 1974, Wilson and Herold executed a Manager's Agreement (Transferee's Exhibit 1). The Agreement makes clear that the business known as Granite City Moving & Storage is the "sole and exclusive property" of Glen Wilson. The Agreement has been in effect and observed by the parties thereto since that date. Among other things, the Agreement provides that Herold (the "Manager") receives 93% and Wilson, d/b/a Granite City Moving & Storage (the "First Party"), receives seven percent of the gross income arising from the line haul from all local (within Stearns, Benton and Sherburne Counties) and intrastate moves. It also provides that Herold account in writing for all such income to the First Party on a monthly basis. Since October 30, 1974, Herold has made that accounting and remitted, by check from "Granite City Moving & Storage", checks for seven percent of that income to Wilson. The Agreement provides for all other particulars noted at Finding 4, and provides further that Herold has an option to purchase from Wilson "the business and Permit No. 942 thereunder" at a price of \$5,000.

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8. On March 24, 1988, Herold tendered a check to Wilson for \$5,000 in order to exercise the option outlined in the preceding Finding. Subsequent to that date, Wilson signed the Joint Petition, which Herold had submitted for Wilson's signature along with his check. The Transferor and Transferee filed their Joint Petition for Transfer of Permit Carrier Authority on July 22, 1988. The record does not reveal the precise date Wilson and Herold agreed to the sale, and there is no written sale agreement. The date of this Agreement is after June 1, 1988 and prior to July 22, 1988.

9. During the two-year period between June 1, 1986 and May 31, 1988, Granite City Moving & Storage made 202 moves of

household goods, 194 of residential household goods and eight of office equipment, under Permit 942. See Transferee's Exhibits 5 and 6. Residential moves were performed within, to or from the counties of Stearns, Sherburne, Benton, Wright, Morrison and Douglas, and the office moves were all within the counties of Stearns, Sherburne and Benton.

10. The cab cards for the vehicles used for moves conducted under Permit 942 are registered in the name of Glen Wilson, d/b/a Granite City Moving & Storage. The annual financial reports to the Minnesota Department of Transportation for activity performed under Permit 942 are filed in the name of Glen Wilson, d/b/a Granite City Moving & Storage. See Transferee's Exhibits 2 and 3.

11. Mr. Herold separates the financial records for business performed under Permit 942 from that performed as agent for North American Van Lines under the ICC permit. All intrastate activity is recorded on forms headed "Granite City Moving & Storage", while interstate activity is recorded on separate forms supplied by North American Van Lines.

12. Except for infrequent (six or seven times a year) ten-second radio spots and a yearly newspaper ad, all of Granite City Moving & Storage's advertising is done in the telephone yellow pages distributed in the St. Cloud area. Page 156 of the St. Cloud U. S. West Direct Yellow Pages for 1989-90 lists Granite City Moving & Storage separately from North American Van Lines. The first-named listing is a line entry with a note to "Please See Advertisement This Page". The other listing is a column ad for North American Van Lines, which ad lists the ICC permit number and states "'For Information Call' St. Cloud Agent". There follows a line for the phone number of Granite City Moving & Storage. The separate advertisement referred to in the Granite City Moving & Storage alphabetical listing is on the bottom margin of page 156, identifies Granite City Moving & Storage as agent for North American Van Lines and lists both ICC and Minnesota permit numbers. All of the entries noted in this Finding list the same telephone number, 252-1311. When a person calls that number in St. Cloud, the phone is answered "Granite City North American".

13. Granite City Moving & Storage's tariff is set by Mr. Herold. In addition to the monthly accounting and payment, Mr. Herold has consulted with Mr. Wilson an average of once per year since 1974, but had not seen or spoken to him for four years prior to the hearing.

14. The price paid by Mr. Herold for Mr. Wilson's permit, \$5,000, can be recouped by Mr. Herold (because of not having to remit seven percent of the gross income earned under the permit) in approximately two years.

15. Granite City Moving & Storage performs intrastate moves with three moving vans, a 1973 Chevrolet, a 1974 International, and a 1983 Volvo. All the vans are straight trucks with attached boxes for storing cargo. All the vans to be used under Permit 942 have been inspected by Mr. Herold, whose testimony that they meet the safety standards of the Commissioner of Transportation is undisputed.

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Any of the above Findings of Fact more properly designated as Conclusions of Law are hereby adopted as such.

2. The Administrative Law Judge and the Transportation Regulation Board have jurisdiction over the subject matter of this hearing under Minn. Stat. 14.50 and 221.151, subd. 1.

3. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

4. The purchase price of Permit No. 942, \$5,000, is an appropriate and reasonable value of the permit considering the assets and goodwill involved.

5. The Transferee is fit and able to conduct the operations authorized under Permit No. 942, as proposed for transfer in this proceeding.

6. The vehicles the Transferee proposes to use in conducting operations under Permit No. 942 meet the safety standards of the Commissioner of Transportation.

7. Only such operating authority as was actually exercised by the Transferor under the Transferor's authority within the two-year period preceding June 1, 1988, the approximate date of the transfer, is proposed for transfer in this proceeding. The bills of lading and abstract of moves for the period between June 1, 1986 and May 31, 1988 establish that the Transferor, under Permit No. 942, exercised its authority to move residential household goods and office furniture in the territories designated in the Amended Petition.

8. The period between June 1, 1986 and May 31, 1988 is the two-year period immediately preceding the date of sale or divesting of interest or control. In this case, the date of sale is the point in time when the Transferor accepted \$5,000 tendered by the Transferee in order to exercise the Transferee's option to purchase IRCC Permit No. 942, which event occurred on or shortly after June 1, 1986, but before July 22, 1988.

9. The filing of the Joint Petition of the Transferor and Transferee with the Board, on or about June 22, 1988, constitutes

a reporting and filing of an agreement for transfer or sale of a permit within 30 days of the agreement for the purposes of Minn. Stat. 221.151, subd. 1.

10. Approval of the sale of Permit No. 942, as restricted by the Amended Petition, will not adversely affect the rights of the users of the service and will not have an adverse effect upon other competing carriers.

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11. A Transportation Regulation Board Order granting the sale of Permit No. 942, as amended herein, will not constitute the granting of a permit to a person or entity which holds a certificate or permit other than a local cartage carrier permit from the Board or to a common carrier by rail.

THIS REPORT IS NOT AN ORDER AND NO AUTHORITY IS GRANTED HEREIN. THE TRANSPORTATION REGULATION BOARD WILL ISSUE THE ORDER OF AUTHORITY WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATIONS.

Based upon the foregoing Conclusions, the Administrative makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Joint Petition to transfer IRCC Permit No. 942, as restricted in the Amended Petition, be GRANTED.

Dated this day of November, 1989.

RICHARD C. LUIS
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped.

MEMORANDUM

Minn. Stat. 221.151, subd. 1 provides, in relevant part:

. . . [T]he board shall make no order approving the sale or lease of a permit if the board finds that the price

paid for the sale or lease of a permit is disproportionate to the reasonable value of the permit considering the assets and goodwill involved. The board shall approve the sale or lease of a permit only after a finding that the transferee is fit and able to conduct the operations authorized under the permit and that the vehicles the transferee proposes to use in conducting the operations meet the safety standards of the commissioner. In determining the extent of the operating authority to be conducted by the transferee under the sale or lease of the permit, the past operations of the transferor within

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the two-year period immediately preceding the transfer must be considered. Only such operating authority may be granted to the transferee as was actually exercised by the transferor under the transferor's authority within the two-year period immediately preceding the transfer as evidenced by bills of lading, company records, operation records, or other relevant evidence. For purposes of determining the two-year period, the date of divesting of interest or control is the date of the sale. The board shall look to the substance of the transaction rather than the form. An agreement for the transfer or sale of a permit must be reported and filed with the board within 30 days of the agreement.

(Emphasis supplied.) The Protestants' argument is twofold. First, they argue that the relevant two-year period for the purpose of the above statute is 1968-1970, the two years prior to the time the Transferee and Transferor entered into an agreement to sell Permit No. 942. Since there is no evidence regarding the Transferor's operations for that period, the argument is that this Joint Petition must be denied. Second, they argue that the Transferor, Glen Wilson, having been retired from the moving business since the early 1970s, actually exercised none of his authority during any two-year period after his retirement up to the date of the Joint Petition. Therefore, there is nothing to be transferred. The Administrative Law Judge is unable to accept either argument.

The purpose of the above-quoted statute is to prevent the transfer of greater authority than had been exercised during the two years prior to the transfer of the permit. For instance, if a carrier has authority to operate in the Twin Cities Metropolitan Area as well as St. Louis County, but has only operated in St. Louis County for more than two years prior to a sale of its permit, the statute prevents the purchaser from receiving a permit granting the authority to operate anywhere but St. Louis County. As applied to the facts of this case, the authority owned by the Transferor was "grandfathered" IRCC authority to transport general commodities statewide. In fact, since the early 1970s, IRCC Permit No. 942 has been exercised

only to move residential household goods within, to and from the six counties noted in the Amended Petition and to move office equipment and furniture within the counties of Stearns, Sherburne and Benton. That is all the Amended Petition proposes for transfer, and that is all the statute allows the Board to authorize for transfer.

The argument that the date of transfer of Permit No. 942 was sometime in 1970 is misplaced. The PSC found that Glen Wilson and John Herold entered into a sale and purchase agreement for the sale and purchase of Wilson's IRCC authority on or about January 1, 1970, and that the agreement was later amended, but it makes no Finding that such a purchase was actually made. In fact, no purchase was made until mid-1988, when the "option to buy" clause of the Manager's Agreement between Wilson, d/b/a Granite City Moving & Storage, and Herold was finally exercised.

The argument that the Amended Petition should be denied because Glen Wilson's personal involvement in the operations and business affairs conducted under Permit No. 942 is so minimal, limited to filing for cab cards for the

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first year after the Manager's Agreement was signed on October 30, 1974, and that John Herold, d/b/a Granite City Moving & Storage, has been in control of the household goods operations pursuant to the grandfather IRCC authority issued to Glen Wilson since on or about January 1, 1970, is also rejected by the Administrative Law Judge. The Protestants are correct in noting that Herold was in control of such operations from 1970 to 1974. The PSC, in its November 5, 1974 Order, found that Herold had been actively engaged in transportation services as a household mover under color of Wilson's authority but in the absence of any employment or lease arrangement with Wilson. In the opinion of the Administrative Law Judge, it was the inability to prove that such arrangements existed that defeated the 1974 Petition. The Joint Petition under consideration in this proceeding does not suffer from those defects.

The Manager's Agreement made on October 30, 1974 cures the defects found by the Commission and alleged to still exist by the Protestants. It formalizes in writing the fact that Herold has transferred to Glen Wilson his registered trade name, Granite City Moving & Storage, as the name of a business entity owned by Wilson. The entity exists to exercise Wilson's operating authority under IRCC Permit No. 942. The entity, Glen Wilson, d/b/a Granite City Moving & Storage, which is owned by Wilson and managed by Herold, is the entity that has exercised all authority used under Permit No. 942 since the Manager's Agreement was signed. And, for the two-year period preceding the acceptance by Wilson of \$5,000 from Herold in exercise of Herold's option to buy the permit, the Transferor -- Glen Wilson, d/b/a Granite City Moving & Storage -- actually

exercised the authority reflected in the Amended Petition that is proposed for transfer herein. In fact, the business operations exercised under the permit have changed very little in the 15 years since the Agreement was signed.

The October 30, 1974 Manager's Agreement is a valid employment agreement. Even though Wilson performed only a few management functions, and all of these were performed in the early years since the contract was executed, the business was still his property and he retained the right and power to initiate any level of involvement he so chose. His willingness to leave the details of the business to Herold should not be decisive because Wilson never gave up his right to exercise control.

In applying Minn. Stat. 221.151, subd. 1 to the facts of this case, the relevant inquiry in determining what authority "was actually exercised by the transferor" should focus not on what Glen Wilson did personally but on what portion of the potential authority was exercised. The statute requires a transferor to make a showing of actual moves as opposed to what could have been moved under the entire scope of the authority. The phrase "actually exercised by the transferor" does not mean that Glen Wilson had to have personally involved himself in business details or labor, but only that it was his operation, Glen Wilson, d/b/a Granite City Moving & Storage, that exercised the authority granted to it. Nothing in the statute prevents the Transferor from operating in whole or in part through an agent or employee such as Mr. Herold.

The facts that the business forms used by Granite City Moving & Storage do not contain Wilson's name, that the business's advertisements or placards do not mention Wilson, that checks written by the business are in the name of "Granite City Moving & Storage" and do not mention Wilson, that the name "Glen Wilson, d/b/a Granite City Moving & Storage" is not registered as a trade name, and that Wilson is not referred to when Granite City answers its telephone should not prevent approval of the proposed transfer of authority. Since 1970,

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the permit authority has been in the name of Glen Wilson, d/b/a Granite City Moving & Storage. The Manager's Agreement reflects the same ownership of the name, by clearly stating that Wilson is the sole and exclusive owner of a business known as Granite City Moving & Storage. The controlling statute requires the Board "to look to the substance of the transaction rather than the form". In this case, the evidence is clear that the parties intended for Wilson to own the name "Granite City Moving & Storage", and that moves made under that name were intended to be his.

R.C.L.

November 30, 1989

Elliott Perovich, Chairman
Minnesota Transportation Regulation Board
254 Livestock Exchange Building
100 Stockyards Road
South St. Paul, MN 55075

Re: In the Matter of the Petition of Glen D. Wilson, d/b/a
Granite City Moving & Storage, Transferor, and John S.
Herold, Transferee, to Transfer Irregular Route Common
Carrier Permit Authority; OAH Docket No. 7-3001-2807-2;
TRB Docket No. IRCC 942/61793/T-88-301.

Dear Chairman Perovich:

Enclosed and served upon you by mail, please find the Findings
of Fact, Conclusions and Recommendation of the Administrative Law
Judge in the above-
entitled matter. I also enclose the official record, and I am
closing our file in this matter.

Very truly yours,

RICHARD C. LUIS
Administrative Law Judge

Telephone: 612/349-2542

RCL:lr

Enclosures

cc: John R. Koch, Esq.
James H. Wills, Esq.
Grant J. Merritt, Esq.
Robert D. Gisvold, Esq.

Service List

Elliott Perovich, Chairman
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December 1, 1989

Elliott Perovich, Chairman
Minnesota Transportation Regulation Board
254 Livestock Exchange Building
100 Stockyards Road
South St. Paul, MN 55075

Re: In the Matter of the Petition of Glen D. Wilson, d/b/a
Granite City Moving & Storage, Transferor, and John S.
Herold, Transferee, to Transfer Irregular Route Common
Carrier Permit Authority; OAH Docket No. 7-3001-2807-2;
TRB Docket No. IRCC 942/61793/T-88-301.

Dear Chairman Perovich:

In reviewing the Findings of Fact, Conclusions and Recommendation mailed to you yesterday in the above-entitled matter, I note that a typographical error has been made in Conclusion 8 on page 5. The date, June 1, 1986 should be changed to June 1, 1988 on the last line of the Conclusion. The corrected Conclusion reads:

8. The period between June 1, 1986 and May 31, 1988 is the two-year period immediately preceding the date of sale or divesting of interest or control. In this case, the date of sale is the point in time when the Transferor accepted \$5,000 tendered by the Transferee in order to exercise the Transferee's option to purchase IRCC Permit No. 942, which event occurred on or shortly after June 1, 1988, but before July 22, 1988.

Very truly yours,

RICHARD C. LUIS
Administrative Law Judge
Telephone: 612/349-2542

RCL/lr

cc: John R. Koch, Esq.
James H. Wills, Esq.
Grant J. Merritt, Esq.
Robert D. Gisvold, Esq.